FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~708~~ 37

FRANK WILKINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND MOTION FOR LEAVE TO USE ORIGINAL EXHIBITS

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INDEX

Table of Cases

Other Authorities

Constitutional Provisions, Statutes and Rules

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on December 14, 1959 (Petition for Rehearing denied January 14, 1960).

Introductory Statement

The court below has construed *Barenblatt* v. *United States*, 360 U. S. 109, in a manner that conflicts with the general principles of the scope of legislative investigations laid down by this Court and has decided important questions of federal law not previously specifically ruled upon by this Court. The importance of the federal questions raised

lies not only in the fact that the powers of Congressional committees and the rights of witnesses subpoenaed before them are herein involved, but also in the fact that the vital First Amendment right of the people to petition the Government for redress of grievances is at issue.

Motion for Leave to Use Original Exhibits

The District Court granted a motion filed by the petitioner on May 6, 1959, that "the original exhibits filed in this case be forwarded as original documents to the Fifth Circuit Court of Appeals for use in such appeal in order to obviate the necessity of reproducing them in the record on appeal." (R. 106, 107)[1] These exhibits consist of 16 government exhibits admitted into evidence. They are voluminous and in large part surplus, because repetitious. They largely have to do with the authority of the subcommittee of the House Committee on Un-American Activities to hold the hearings in question in Atlanta and with the legal establishment of the pertinency of the questions asked your petitioner. The parts of these exhibits deemed relevant by the petitioner are set forth either in the decision of the court below or in this petition.

The petitioner, therefore, moves that this Court order that the original exhibits filed in this case be now forwarded to it in order to obviate the necessity of reproducing them in the record before this Court.

Opinions Below

Petitioner was tried before a jury. The District Court rendered no opinion in orally denying the motions for a directed verdict of acquittal (R. 80-85), in arrest of judg-

[1] Record on Appeal to the Court of Appeals for the Fifth Circuit, hereinafter designated, "R." Nine copies of this record have been filed with the Clerk of the Court.

ment and for a new trial (R. 103-106). The opinion and order of the Court of Appeals entered December 14, 1959 are not yet officially reported and are printed in Appendix B, *infra*, p. 4a.

Jurisdiction

The opinion and judgment of the United States Court of Appeals were entered December 14, 1959. Petition for rehearing was denied January 14, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Congress did not authorize the Committee to investigate propaganda activities against itself.

2. If Congress authorized the Committee to investigate propaganda activities against itself, such authorization is void as violative of the First Amendment.

3. The Committee did not have a legislative purpose in subpoenaing petitioner, but rather had the unlawful purpose of harassing or exposing him.

4. The question asked the petitioner was not pertinent to the matter under inquiry.

5. Because the *Barenblatt* decision has permitted this result, it requires clarification or revision by this Court.

Constitutional and Statutory Provisions Involved

These are printed in Appendix A, *infra*, pages 1a-3a.

Statement

Petitioner, Frank Wilkinson, was convicted in the District Court for the Northern District of Georgia under an indictment charging violation of 2 U.S.C. § 192 for refusing to answer a question before a subcommittee of the House Committee on Un-American Activities. The indictment charged, in substance, that petitioner "unlawfully refused to answer" the following question "pertinent to the question then under inquiry":

"Are you now a member of the Communist Party?"

For a period of time prior to petitioner's appearance before the subcommittee on July 30, 1958, and prior to December 1956, he had engaged in activities directed toward persuading the public to petition the government to abolish the House Committee on Un-American Activities. In December 1956, at a hearing of the Committee in Los Angeles, he appeared before it in response to a subpoena and refused to answer questions then propounded to him by the Committee in language substantially the same as that used in refusing to answer questions at the Atlanta hearing that led to his indictment and conviction in the instant case (R. 66).

Pursuant to subpoena, petitioner appeared and testified on July 30, 1958, before the subcommittee in Atlanta, which had been authorized by the chairman of the Committee, to conduct hearings upon the following subjects (in pertinent part):*

> "1. The extent, character and objects of Communist colonization and infiltration in the textile and other basic industries located in the South, and Communist Party propaganda activities in the South, the legislative purpose being:
>
> (a) To obtain additional information for use by the Committee in its consideration of Section 16 of

* The full stated purposes are set forth in footnote, *supra*, pp. 10, 11.

H.R. 9352, relating to the proposed amendment of Section 4 of the Communist Control Act of 1954, prescribing a penalty for knowingly and wilfully becoming or remaining a member of the Communist Party with knowledge of the purposes or objectives thereof; and

"(b) To obtain additional information, adding to the Committee's overall knowledge on the subject so that Congress may be kept informed and thus prepared to enact remedial legislation in the National Defense, and for internal security, when and if the exigencies of the situation require it."

The claimed authority of the subcommittee to make such investigation is founded upon the authority of the Committee itself which is set forth in Rule XI of the House of Representatives, 60 Stat. 828, and Resolution of January 3, 1957, adopting such Rule and the applicable provisions of the Legislative Reorganization Act of 1946, as amended, as the rules of the House of Representatives for the 85th Congress (R. 25, 26 and Govt. Exh. 6).[1]

The subpoena dated July 22, 1958, in Washington, D. C., was served on Wilkinson on July 23, 1958, within an hour after he arrived at his hotel in Atlanta (R. 72-74). The subpoena was issued after the Committee learned that Wilkinson had come to Atlanta to try to organize public sentiment against the Subcommittee's holding of hearings there (R. 67, and Govt. Exh. 2, p. 8).

Wilkinson appeared before the Subcommittee in response to such subpoena on July 30, 1958, but after identifying himself refused to answer the question set forth in the indictment. He stated:

"I challenge, in the most fundamental sense, the legality of the House Committee on Un-American Activities. It is my opinion that this committee

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[1] This rule, and the applicable provisions of the law and of the Constitution are set forth in Appendix A, *infra*, pp. 1a-3a.

stands in direct violation by its mandate and by its practices of the first amendment to the United States Constitution. It is my belief that Congress had no authority to establish this committee in the first instance, nor to instruct it with the mandate which it has.

I have the utmost respect for the broad powers which the Congress of the United States must have to carry on its investigations for legislative purposes. However, the United States Supreme Court has held that, broad as these powers may be, the Congress cannot investigate into an area where it cannot legislate, and this committee tends, by its mandate and by its practices, to investigate into precisely those areas of free speech, religion, peaceful association and assembly, and the press, wherein it cannot legislate and therefore it cannot investigate.

I am, therefore, refusing to answer any questions of this committee." (Govt. Exh. 2, p. 9)

Proceedings Below

At the presentment on January 12, 1959, after a motion for continuance was overruled, the petitioner waived arraignment and plead, "Not Guilty," to the indictment (R., p. 3). After a trial before a jury, on January 20 and 21, 1959, the jury on the later date found the petitioner guilty (R., 3-6). Upon the conclusion of the government's case, the petitioner made a motion for judgment of acquittal (R. 80-85), after denial of which the defense rested. Following the finding of a verdict of conviction by the jury, a motion in arrest of judgment prior to judgment and imposition of sentence was made and denied (R. 7). After sentence, a motion for a new trial was made and denied (R. 103). Thereafter, the appeal proceeded as hereinbefore set forth.

Reasons for Granting the Writ

I

Congress did not authorize the Committee to investigate propaganda activities against itself.

The petitioner was subpoenaed to appear before the Subcommittee's hearings in Atlanta, in the words of the Committee's director, Mr. Richard Arens, because:

> "It is the information of the committee or the suggestion of the committee that in anticipation of the hearings here in Atlanta, Georgia, you were sent to this area by the Communist Party for the purpose of developing a hostile sentiment to this committee and to its work for the purpose of undertaking to bring pressure upon the United States Congress to preclude these particular hearings. It is the fact that you were not even subpoenaed for these particular hearings until we learned that you were in town for that very purpose and that you were not subpoenaed to appear before this committee until you had actually registered in the hotel here in Atlanta." (The full statement of Mr. Arens is set forth in the margin of the Court of Appeals opinion, Appendix B, *infra*, pp. 4a-12a.)

The court below held this Court's decision in *Barenblatt* v. *United States*, 360 U. S. 109, that "* * * in pursuance of its legislative concerns in the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country (at p. 118)," included "the power to investigate activities directed to interference with the legislative processes and their functioning." (Opinion, Appendix B, *infra*, pp. 4a-12a). That conclusion does not follow and as here applied, cannot be correct. There is nothing in the record to show that the Congress actually authorized the Committee to investigate activities "directed to interference with the legislative processes and their functioning"

but rather that the Committee was only authorized to investigate "Un-American propaganda activities." The activities alleged against the petitioner that have to do with the legislative processes were to develop a "hostile sentiment" to the Committee for "the purpose of undertaking to bring pressure upon the United States Congress to preclude these particular hearings." Such activities are directed toward the petitioning of the government for redress of grievances and in the absence of clear authorization by the Congress cannot be presumed to come within the pervasive authority granted the Committee, as Congress cannot be presumed to have invaded a constitutional danger zone so clearly marked. *Watkins* v. *United States*, 354 U. S. 178.

Public criticism of a committee of Congress cannot be construed, as such, to be in "the domain of 'national security'", as "Communist", or as "un-American" even though it may be shown that Communists engage in it.

II

If Congress authorized the Committee to investigate propaganda activities against itself, such authorization is void as violative of the First Amendment.

The court below construed *United States* v. *Harriss*, 347 U. S. 612, as holding that "the Congress is not prohibited by the First Amendment guarantee of the right to petition the government to redress of grievances from exercising measures of self-protection in requiring disclosures of lobbying activities. (Opinion, *infra*, p. 11a)." This Court carefully circumscribed its opinion in *Harriss* to support no such conclusion. In *Harriss*, Mr. Chief Justice Warren, speaking for the Court, construed the Lobbying Act "narrowly to avoid constitutional doubts (p. 623)." He stated, at page 620, "[W]e believe this language should be construed to refer only to 'lobbying in its commonly accepted

sense"—to direct communication with members of Congress on pending or proposed Federal legislation." And, at page 625, "Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities." The Court specifically disposed of "[h]ypothetical borderline situations * * * in which * * * persons choose to remain silent because of fear of possible prosecution for failure to comply with the [Lobbying] Act." It said, "Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint (p. 626)." Here petitioner urges that whatever reasonable fears may have been dissipated by such narrow construction of the Lobbying Act are reasonably revived by the court below's opinion that Congress may legislate restricting, by requiring disclosure of motivation, the right to carry on a public campaign toward petitioning the government for redress of grievances.

To hold that Congress can so investigate because it has the power to legislate to restrict the right to petition by requiring exposure of the motivations of those who seek to petition, would defeat the very purpose of the First Amendment, by foreclosing the political process through which legislative excesses may be curbed.

Free speech on political topics is more than a personal right. "The greater importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolative the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired may be obtained by peaceful means." *DeJonge* v. *Oregon*, 299 U. S. 353, 365.

In *Barenblatt*, the Court said: "Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships * * * Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interest at stake in the particular circumstances shown (p. 126)." Here the "subordinating interest of the state" is neither compelling nor existing, as the Congress had no power to legislate to circumscribe the petitioner's efforts in opposition to the Committee by requiring a disclosure of his motivation. There was nothing to put into balance in support of the state's interest in the domain of "national security".

III

The Committee did not have a legislative purpose in subpoenaing petitioner, but rather had the unlawful purpose of harassing or exposing him.

The resolution of the Committee on Un-American Activities authorizing and directing the holding of the hearings in Atlanta is set forth in Government Exhibit 2, Page 3, and Government Exhibit 9. For convenience of reference, the specific purposes are set forth in full in the margin here.[1] On direct examination, Government Witness Richard Arens, summarized this purpose as follows:

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[1] 1. The extent, character and *objects of Communist colonization and infiltration in the textile and other basic industries located in the South*, and *Communist Party propaganda activities in the South*, the legislative purpose being:

(a) To obtain additional information for use by the Committee in its consideration of Section 16 of H.R. 9352, relating to the proposed amendment of Section 4 of the Communist Control Act of 1954, prescribing a penalty for knowingly and

"Q. Now, what was the subject under inquiry when the House Un-American Activities Committee, the subcommittee, that is, came down to Atlanta, Georgia in July of last year, July 29, 30, 31 of 1958? A. The general subject under inquiry by the committee was the extent and character and objects of communist colonization, infiltration in the textile industry and other basic industries located in the South. The extent to which the Communist party and communists were engaging in communist propaganda activities through communist front organizations and the like in the So[illegible].

Q. Did it ha[illegible]ny relationship to foreign communistic propaganda? A. Yes. I should have mentioned that too. We were also concerned and as the record will reflect, received testimony respecting the dissemination of foreign communistic propaganda in the South." (R. pp. 39-40)

There was no evidence introduced at either the hearings or the trial to show that the petitioner had any information concerning these matters, the subject of investigation, or, for that matter, that he had ever been in the South

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wilfully becoming or remaining a member of the Communist Party with knowledge of the purposes or objectives thereof; and

(b) To obtain additional information, adding to the Committee's overall knowledge on the subject so that Congress may be kept informed and thus prepared to enact remedial legislation in the National Defense, and for internal security, when and if the exigencies of the situation require it.

2. Entry and dissemination within the United States of foreign Communist Party propaganda, the legislative purpose being to determine the necessity for, and advisability of, amendments to the Foreign Agents Registration Act designed more effectively to counteract the Communist schemes and devices now used in avoiding the prohibitions of the Act.

3. Any other matter within the jurisdiction of the Committee which it, or any subcommittee thereof, appointed to conduct this hearing, may designate.

before. On the contrary, the Committee had every reason to believe that the petitioner would refuse to answer any questions of the Committee. His subpoenaing, therefore, could serve no legislative purpose, but was only for the purpose of harassment and exposure.

In December of 1956, the petitioner was subpoenaed to appear before hearings of the Committee at Los Angeles. He there declined to answer the questions of the Committee and made essentially the same statement of reasons for declining to answer them (R. 66).

In *United States* v. *Tucker*, 267 F. 2d 212 (3rd Cir.), decided May 8, 1959, the court in remanding a criminal case for a third trial warned against a repetition of the *impropriety* of requiring a witness to take the stand in the second trial where he had plead his constitutional privilege against self-incrimination when he was on the stand in the first trial and where, "There is no suggestion that the government had any reason to believe that at the second trial the witness would answer those questions he refused to answer at the first trial" (p. 215). Petitioner submits that the subpoenaing of him at Atlanta, after he had refused to testify before the Committee in Los Angeles almost two years earlier, is analogous to this. He urges that the only purpose of subpoenaing him was to discredit him in his efforts to induce the public to petition the government for the abolition of the Committee. This conclusion is fortified by the reasons advanced by the Committee's Staff Director, Mr. Arens, for the subpoenaing of the petitioner.

IV

The question asked the petitioner was not pertinent to the matter under inquiry.

The trial court having ruled as a matter of law that the question of pertinency was one for the court to determine and, having so determined, instructed the jury that the question upon which the petitioner was indicted:

> "Are you now a member of the Communist Party." (R 1-2),

was pertinent, the petitioner did not take exception to that instruction (R 103). He is not here, therefore, in a position to assert that this was properly a question for the jury.

He can and does assert that the ruling of the trial court as a matter of law, that the question was pertinent, was erroneous and asserts that the Court of Appeals decision affirming that ruling (Opr., Appendix B, p. 4a) was erroneous.

The question of pertinency being thus before the Court, petitioner contends that the question he refused to answer, which resulted in his conviction, was not in law pertinent to the subject under inquiry.

This Court in *Barenblatt* said, at page 134: "There is no indication in this record that the Subcommittee was attempting to pillory witnesses." Here, the record is clear that the Subcommittee was attempting to do exactly that to the petitioner.

The mere statement of the Committee's staff director that the petitioner was "a hard-core Communist" (see margin statement Court of Appeals decision, Appendix B) is not sufficient to establish the right of the Committee to hold the petitioner accountable, under compulsory process, for refusing to answer the question, "Are you now a member of the Communist Party?", in the absence of a showing of relationship of the person subpoenaed to the specific subject of the inquiry, if such there was, not a general "pervasive" catch-all investigation.

Both *Watkins* and *Barenblatt*, in requiring that the witness be "sufficiently apprised of 'the topic under inquiry' * * * authorized [by the Congress] and 'the connective reasoning whereby the precise questions asked related to it'" (360 U. S. at p. 124), clearly indicate that there must be a specific subject under inquiry and the witness must have some relationship to that specific subject. When 2 U.S.C. 192 states that it is a contempt to refuse "to answer any question pertinent to the question under inquiry" it means that there must be a specific subject under inquiry. Here the subject matter, as stated by the Committee chairman at the opening (Govt. Exh. 2, pp. 4-6) and by the Staff Director as quoted by the court below (Appendix B, *infra*, pp. 5a-8a), has at most a superficial ring of specificity in referring to a few statutes. Actually the statements as to the whole purpose of the investigation are all inclusive and fully as broad as the resolution establishing the Committee; the Court in *Watkins* held that the resolution establishing the Committee did not in itself establish a sufficiently definite subject of inquiry. The type of subject which the Court indicated in *Watkins* and *Barenblatt* was sufficiently specific (i.e., what was the degree of Communist infiltration in the field of labor or in the field of education), was not spelled out here.

To hold otherwise would give the House Committee on Un-American Activities the power to subpoena all Americans. The Committee is presently investigating "Communist Activity Among Youth Groups."[1] If this concept

[1] Verbatim reproduction of press release:

FOR IMMEDIATE RELEASE
January 14, 1960

COMMITTEE ON UN-AMERICAN ACTIVITIES
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

The Committee on Un-American Activities announced today that it will hold public hearings in Washington, D. C., beginning on Tuesday, February 2, 1960, on Communist activities among youth groups. The hearings will begin at 10:00 a.m., in the Caucas Room, Old House Office Building.

is affirmed, there is no limit to the pervasive area of investigation accorded to the Committee, as long as it makes an unsubstantiated assertion that one is a Communist or subversive (*Barenblatt* v. *United States*, 360 U. S. 109). The Committee may now proceed, under this interpretation of its authority, to investigate Communist propaganda activity "among men," "among women," and, then "among sexual deviants."[1]

Petitioner, in his brief to the Court of Appeals, urged that this pervasive power to investigate could not include the "'man in the street' just because he happened to be on that street." We urged that a nexus between the person subpoenaed and the pertinency of the question asked in relation to the specific inquiry must be priorly established. The Court of Appeals did not dispose of this question, but ignored it.

The Court of Appeals for the District of Columbia, in *Rumely* v. *United States*, did consider it and adversely resolved it by ruling that pertinency meant:

> "* * * as we have indicated, 'pertinent', as used to describe a requisite for valid congressional inquiry means pertinent to a subject matter properly under inquiry, not generally pertinent to the person under interrogation. Moreover, this appellant registered under protest."

This Court did not rule on this question in *Rumely* in reversing the conviction on other grounds (for violation of the Lobbying Act). It did state, however:

> "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into

[1] In this connection, it is interesting to note that the Florida Legislative Investigation Committee publicly investigated alleged homosexuality on the campus of the University of Florida. Whether this was either "Un-American," "Communist," or "subversive" activity was not specified.

> all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." (345 U.S. 41, 46)

We urge that this Court in *Barenblatt* in upholding the Committee's power there to ask the witness whether he was a member of the Communist Party did not mean that the Committee had the power at any time to subpoena any individual to ask him this question. As part of this Court's ruling that the question could be asked of Barenblatt, the Court had established that there was a specific subject under inquiry to which the witness was related: that is, the subject under inquiry was Communist infiltration into the field of education and Barenblatt had been shown to be active in this field. We believe that the *Barenblatt* ruling was intended to establish that the witness could be asked about his Communist Party membership if and when his relationship to the subject of investigation was shown. We urge that the court below erred in its application of the *Barenblatt* opinion when it failed to consider that there must be such a connection between the witness and the subject of investigation in order to establish pertinency.

This question which has become crucial in both federal and state legislative investigations by interpretations of this Court's term "pervasive authority" to investigate in the field of "security" as authorization to each; in "the domain of 'national security'" (*Barenblatt v. United States*, 360 U. S. 109) or the domain of "state security." (*Uphaus v. Wyman*, 360 U. S. 72.) It is raised here on the limited question of pertinency. The Court should take cognizance of it and hear it fully.

V.

Because the *Barenblatt* decision has permitted this result, it requires classification or revision by this Court.

Petitioner has asserted before the Court of Appeals that this Court's decision in *Barenblatt* is erroneous and raised all the questions presented in that case in the event that this Court would grant the petition for rehearing then pending. The petition for rehearing in *Barenblatt* was denied and the bases therefore were disregarded by the court below. Petitioner believes that this Court should now reconsider them.[1]

CONCLUSION

For the foregoing reasons, it is prayed that the motion for leave to use the original exhibits and the petition for a *writ of certiorari* be granted.

Respectfully submitted,

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[1] A perceptive logical and philosophical analysis of the *Barenblatt* opinion by Alexander Meiklejohn is scheduled for publication in 27 University of Chicago Law Review 2 (Winter 1960). 10 preprints of this review have been deposited with the Clerk of the Court.

APPENDIX A

The constitutional, statutory provisions and rules involved read in relevant part:

CONSTITUTION OF THE UNITED STATES OF AMERICA

* * *

Article I, Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Article II, Section. 1. The executive power shall be vested in a President of the United States of America.

* * *

Article III, Section 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time order and establish.

* * *

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

Amendment 5. No person shall * * * be deprived of life, liberty, or property without due process of law.

Amendment 6. In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *

* * *

Amendment 10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Appendix A

2 U. S. C. Section 192, R. S. 102, (52 Stat. 942), as amended:

"Refusal of witness to testify.

"Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828) and House Resolution 5 of the 83rd Congress:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"RULE XI

"*Power and Duties of Committees*

"(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees, respectively * * *

"(q)(1) Committee on Un-American Activities.

"(A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion

within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Rule 7(c) of the Federal Rules of Criminal Procedure provides in relevant part:

"Rule 7. The Indictment and the Information.

(c) NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 17723

FRANK WILKINSON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(December 14, 1959)

Before:

HUTCHESON, CAMERON and JONES,
Circuit Judges.

JONES, *Circuit Judge*:

It is provided, among other things, by Rule XI of the House of Representatives that:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign

countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

A Subcommittee of the Committee on Un-American Activities scheduled hearings in Atlanta, Georgia. At the opening session on July 29, 1958, Representative Francis E. Walter, Chairman of the Committee presided and made a statement which included the following:

"The hearings which begin today in Atlanta are in furtherance of the powers and duties of the Committee on Un-American Activities, pursuant to Public Law 601 of the 79th Congress, which not only establishes the basic jurisdiction of the committee but also mandates this committee, along with other standing committees of the Congress to exercise continuous watchfulness of the execution of any laws the subject matter of which is within the jurisdiction of the committee.

"In response to this power and duty, the Committee on Un-American Activities is continuously in the process of accumulating factual information respecting Communists, the Communist Party, and Communist activities which will enable the committee and the Congress to appraise the administration and operation of the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954, and numerous provisions of the Criminal Code relating to espionage, sabotage, and subversion. In addition, the committee has before it numerous proposals to strengthen our legislative weapons designed to protect the internal security of this Nation.

"In the course of the last few years, as a result of hearings and investigations, this committee has

Appendix B

made over 80 separate recommendations for legislative action. Legislation has been passed by the Congress embracing 35 of the committee recommendations and 26 separate proposals are currently pending in the Congress on subjects covered by other committee recommendations. Moreover, in the course of the last few years numerous recommendations made by the committee for administrative action have been adopted by the executive agencies of the Government.

"The hearings in Atlanta are in furtherance of a project of this committee on current techniques of the Communist conspiracy in this Nation. Today, the Communist Party, though reduced in size as a formal entity, is a greater menace than ever before. It has long since divested itself of unreliable elements. Those who remain are the hard-core, disciplined agents of the Kremlin on American soil. Most of the Communist Party operation in the United States today consists of underground, behind-the-scenes manipulations. The operation is focused at nerve centers of the Nation and masquerades behind a facade of humanitarianism."

The appellant, who had been subpoenaed as a witness, appeared at the hearing on July 30, 1958, was sworn as a witness, answered a question as to his name and was asked to state his residence and to give his occupation. His response was, "As a matter of conscience and personal responsibility, I refuse to answer any questions of this committee." He stated that he was not represented by counsel but knew that he had the privilege of counsel. He was next asked, "Are you now a member of the Communist Party?" His answer again was, "As a matter of conscience and personal responsibility, I refuse to answer any questions of

this Committee". As this point the Committee's Staff Director undertook to state the reasons for and pertinency, and relevancy of the question asked and other questions to be asked. Because the pertinency vel non of the question is a major issue on the appeal, it seems desirable to set forth the Staff Director's statement in the margin.[1] The

[1] "Now, sir, I should like to make an explanation to you of the reasons, the pertinency, and the relevancy of that question and certain other questions which I propose to propound to you; and I do so for the purpose of laying a foundation upon which I will then request the chairman of this subcommittee to order and direct you to answer those questions.

"The Committee on Un-American Activities has two major responsibilities which it is undertaking to perform here in Atlanta.

"Responsibility number 1, is to maintain a continuing surveillance over the administration and operation of a number of our internal security laws. In order to discharge that responsibility the Committee on Un-American Activities must undertake to keep abreast of techniques of Communists' operations in the United States and Communist activities in the United States. In order to know about Communist activities and Communist techniques, we have got to know who the Communists are and what they are doing.

"Responsibility number 2, is to develop factual information which will assist the Committee on Un-American Activities in appraising legislative proposals before the committee.

"There are pending before the committee a number of legislative proposals which undertake to more adequately cope with the Communist Party and the Communist conspiratorial operations in the United States. H.R. 9937, is one of those. Other proposals are pending before the committee not in legislative form yet, put in the form of suggestions that there be an outright outlawry of the Communist Party; secondly, that there be registrations required of certain activities of Communists; third, that there be certain amendments to the Foreign Agents Registration Act because this Congress of the United States has found repeatedly that the Communist Party and Communists in the United States are only instrumentalities of a Kremlin-controlled world Communist apparatus. Similar proposals are pending before this committee.

"Now with reference to pertinency of this question to your own factual situation, may I say that it is the information of this committee that you now are a hard-core member of the Communist

appellant again refused to answer the question. The statement of the Staff Director was followed by a supplemental statement of Representative Edwin E. Willis, Chairman

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Party; that you were designated by the Communist Party for the purpose of creating and manipulating certain organizations, including the Emergency Civil Liberties Committee, the affiliate organizations of the Emergency Civil Liberties Committee, including a particular committee in California and a particular committee in Chicago, a committee—the name of which is along the line of the committee for cultural freedom, or something of that kind. I don't have the name before me at the instant.

"It is the information of the committee or the suggestion of the committee that in anticipation of the hearings here in Atlanta, Georgia, you were sent to this area by the Communist Party for the purpose of developing a hostile sentiment to this committee and to its works for the purpose of undertaking to bring pressure upon the United States Congress to preclude these particular hearings. Indeed it is the fact that you were not even subpoenaed for these particular hearings until we learned that you were in town for that very purpose and that you were not subpoenaed to appear before this committee until you had actually registered in the hotel here in Atlanta.

"Now, sir, if you will tell this committee whether or not, while you are under oath, you are now a Communist, we intend to pursue that area of inquiry and undertake to solicit from you information respecting your activities as a Communist on behalf of the Communist Party, which is tied up directly with the Kremlin; your activities from the standpoint of propaganda; your activities from the standpoint of undertaking to destroy the Federal Bureau of Investigation and the Committee on Un-American Activities, because indeed this committee issued a report entitled 'Operation Abolition,' in which we told something, the information we then possessed, respecting the efforts of the Emergency Civil Liberties Committee, of which you are the guiding light to destroy the F.B.I. and discredit the director of the F.B.I. and to undertake to hamstring the work of this Committee on Un-American Activities.

"So if you will answer that principal question, I intend to pursue the other questions with you to solicit information which would be of interest—which will be of vital necessity, indeed—to this committee in undertaking to develop legislation to protect the United States of America under whose flag you, sir, have protection.

"Now please answer the question: Are you now a member of the Communist Party?"

of the Subcommittee, who ordered and directed the appellant to answer whether he was a Communist. There was this response, "I am refusing to answer any questions of this Committee." Further explanations by members of the Committee or its Staff Director were made; further questions were asked which the appellant was ordered to answer; and these were met by the reiterated statements of the appellant that he was answering no questions of the Committee.

The reasons of the appellant for his refusal to answer any of the Committee's questions were given by him at the Committee hearing in the following statement:

> "I challenge, in the most fundamental sense, the legality of the House Committee on Un-American Activities. It is my opinion that this committee stands in direct violation by its mandate and by its practices of the first amendment to the United States Constitution. It is my belief that Congress had no authority to establish this committee in the first instance, nor to instruct it with the mandate which it has.
>
> "I have the utmost respect for the broad powers which the Congress of the United States must have to carry on its investigations for legislative purposes. However, the United States Supreme Court has held that, broad as these powers may be, the Congress cannot investigate into an area where it cannot legislate, and this committee tends, by its mandate and by its practices, to investigate into precisely those areas of free speech, religion, peaceful association and assembly, and the press, wherein it cannot legislate and therefore it cannot investigate.
>
> "I am, therefore, refusing to answer any questions of this committee."

The appellant was indicted, tried, convicted and sentenced for his refusal to answer the question "Are you now a mem-

ber of the Communist Party." The appellant asks us to reverse his conviction. On May 8, 1959, the appellant filed a Statement of Points on Appeal, saying that he intended to rely on the following:

> "1. The statute and resolution establishing the Committee are unconstitutional on their face and as applied to appellant in that they invade appellant's constitutional rights under the First Amendment in respect of his freedom of speech, political and other association and communication; under the Fifth Amendment in that they provide a constitutionally vague and incomplete standard for inquiry and prosecution; under the Sixth Amendment in that they fail to inform him of the nature and cause of the accusation made against him; and under the Ninth and Tenth Amendments in that they invade rights and powers retained by the people and reserved to the people.
>
> "2. The legislative inquiry and the resulting conviction were unconstitutional and unlawful because of an unlawful purpose to expose appellant."

These are entirely in keeping with the appellant's position at the hearing. Subsequent to the taking of the appeal in this cause but before briefs were filed, the opinion in the Barenblatt case [2] was rendered and a conviction was affirmed for refusal to answer questions of a subcommittee of the House Un-American Activities Committee, including the question, "Are you now a member of the Communist Party?" The same contentions were made in the Barenblatt case as are urged here, and there they were resolved against the position asserted by the appellant. It will follow, there-

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[2] Barenblatt v. United States, 360 U. S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115.

fore, that unless there be something in the case before us to distinguish it from Barenblatt, our decision must be an affirmance.

The defendant in the Barenblatt case was a college professor and an inquiry was being undertaken into Communist infiltration into education. The appellant here admitted that he was engaged in aggressive opposition to the continued functioning of the Committee. The Committee had been informed that the appellant was a hard-core Communist, and he was attempting as a Communist activity to develop hostility to the Committee and its investigations; hence it was within the province of the Committee to make inquiries to ascertain whether Un-American Communist influences were attempting to weaken the Government by impeding and crippling the operation of its legislative branch. As was said in the Barenblatt opinion, "• • • • in pursuance of its legislative concerns in the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country". 360 U. S. 109, 118. Included in that pervasive authority is the power to investigate activities directed to interference with the legislative processes and their functioning. The Congress is not prohibited by the First Amendment guaranty of the right to petition the Government for redress of grievances from exercising measures of self-protection in requiring disclosures of lobbying activities. *United States* v. *Harriss*, 347 U. S. 612, 74 S. Ct. 808, 98 L. Ed. 989. Since legislation in the area may be enacted, investigations by legislative agencies is authorized.

The activities in which the appellant was believed to be participating presented a more direct threat to the national security than those of which Barenblatt was suspected.

Appendix B

The decision in the Barenblatt case is controlling here. The judgment of the district court is

AFFIRMED.

Dec. 15 1959

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana

Judgment

(Extract from the Minutes of December 14, 1959)

No. 17723

FRANK WILKINSON,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 17723

FRANK WILKINSON,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

Petitioner, Frank Wilkinson, respectfully petitions for a rehearing in this matter decided on December 14, 1959.

In support of the petition, petitioner respectfully alleges and shows:

1. This Court erred in construing *United States* v. *Harriss*, 347 U. S. 612, as upholding legislation requiring disclosures of the motivation for the activities charged to the appellant by the House Committee on Un-American Activities. In *Harriss*, Mr. Chief Justice Warren, speaking for the Court, construed the Lobbying Act "narrowly to avoid constitutional doubts" (p. 623). He stated, at page 620, "[W]e believe this language should be construed to refer only to 'lobbying in its commonly accepted sense'—to direct communication with members of Congress on pending or proposed Federal legislation." And, at page 625, "Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities." The Court specifically disposed of "[h]ypothetical borderline situations • • • in which • • •

persons choose to remain silent because of fear of possible prosecution for failure to comply with the [Lobbying] Act." It said, "Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint" (p. 626). Here appellant urges that whatever reasonable fears may have been dissipated by such narrow construction of the Lobbying Act are reasonably revived by this Court's opinion that Congress may legislate restricting, by requiring disclosure of motivation, the right to carry on a public campaign toward petitioning the Government for redress of grievances.

2. This Court erred in interpreting *Barenblatt* v. *United States*, 360 U. S. 109, 118, as holding that the "pervasive authority to investigate Communist activities in this country" authorizes the Un-American Activities Committee to investigate criticism of itself. Such criticism, as such, is not "Communist" or "un-American" activity even though it may be shown that Communists engage in it.

3. This Court erred in making a judicial finding unsupported by the record that, "The activities in which the appellant was believed to be participating presented a more direct threat to the national security than those of which Barenblatt was suspected."

4. This Court erred in construing petitioner's efforts to enlist public support for his "aggressive opposition to the continued functioning of the Committee" as "activities directed to interfere with the legislative processes and their functioning" (Opinion, pp. 8, 9).

5. Petitioner respectfully urges the Court to give consideration to the question of harassment and exposure, considered in *United States* v. *Tucker*, 267 F. 2d 212 (3rd Cir.), decided May 8, 1959, wherein the court in remanding a criminal case for a third trial warned against a repetition of the impropriety of requiring a witness to take the stand in the second trial where he had plead his constitutional

privilege against self-incrimination when he was on the stand in the first trial and where, "There is no suggestion that the government had any reason to believe that at the second trial the witness would answer those questions he refused to answer at the first trial" (p. 215). Petitioner submits that the subpoenaing of him at Atlanta, after he had refused to testify before the Committee in Los Angeles two years earlier, is analogous to this, and he regrets that this case and the supporting cases cited therein were not earlier called to the attention of this Court.

This is the first case where any court has held that Congress may so restrict the right of petition. The constitutional issues here presented were carefully avoided in *Harriss*. Petitioner respectfully requests that this petition for rehearing be granted and that if reargument is ordered it be heard by the Court *en banc*. Petitioner on reargument preserves all other points previously advanced upon the appeal and further preserves such points for consideration by the Supreme Court if a petition for certiorari should become necessary.

Respectfully submitted,

ROWLAND WATTS,
c/o American Civil Liberties Union,
170 Fifth Avenue,
New York 10, N. Y.,
Attorney for Appellant.

Certificate of Counsel

I, ROWLAND WATTS, do hereby certify that I am counsel for the petitioner herein and that this petition for rehearing is presented in good faith and not for delay.

December 31, 1959.

ROWLAND WATTS

Order Denying Rehearing

(Extract from the Minutes of January 14, 1960)

No. 17723

FRANK WILKINSON,

versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.